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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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In this Brief, Petitioner, ALDON KEITH KENTNER, who was Plaintiff in the Circuit Court of the Thirteenth Judicial Circuit of Florida, Appellant in the District Court of Appeal of Florida, Second District, and Petitioner in the Supreme Court of Florida, will be referred to as KENTNER. Respondents SEABOARD COAST LINE RAILROAD COMPANY and the SEACOAST TRANSPORTATION COMPANY, who were co-Defendants in the Circuit Court of the Thirteenth Judicial Circuit of Florida, Appellees in the District Court of Appeal of Florida, Second District, and Respondents in the Supreme Court of Florida, will be referred to collectively as SEABOARD. The following symbols will be used:

(P) Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District filed by KENTNER.

(PA) Appendix to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District filed by KENTNER.

QUESTIONS PRESENTED

Respondents respectfully submit that the questions presented by KENTNER should be framed as follows:

1. WHETHER THE BROAD GENERAL RELEASE EXECUTED BY KENTNER RELEASING AND DISCHARGING CERTAIN NAMED PERSONS AND "ANY OTHER PERSON, FIRM OR CORPORATION CHARGED OR CHARGEABLE WITH RESPONSIBILITY OR LIABILITY," FROM ALL CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, LOSS OF SERVICES, ACTIONS AND CAUSES OF ACTION, ARISING BY REASON OF A SPECIFIC ACCIDENT EFFECTIVELY RELEASED KENTNER'S CLAIM UNDER FELA AGAINST SEABOARD FOR DAMAGES SUSTAINED IN THE SAME ACCIDENT DESCRIBED IN THE RELEASE.

2. WHETHER THE PAROL EVIDENCE RULE PROTECTS SEABOARD, WHOSE RIGHTS DEPEND ON THE LANGUAGE OF THE RELEASE EXECUTED BY KENTNER AND PREVENTS KENTNER FROM CONTRADICTING THAT LANGUAGE.

STATEMENT OF THE CASE

Petitioner has filed a Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Second District, affirming, per curiam, a Summary Final Judgment for Defendants entered by the Circuit Court of Hillsborough County, Florida, in favor of Respondents.

On November 30, 1967, KENTNER, an employee of Respondents, drove a certain tractor/trailer to a warehouse occupied and operated by W. J. SMALLEY, d/b/a SMALLEY TRANSPORTATION COMPANY (hereinafter SMALLEY), in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the agents or employees of SMALLEY. (PA 14) At the same time and place, KENTNER was called upon to assist in the loading of said rugs and, in the process of loading same, a rug was pushed against KENTNER'S leg causing him to fall and resulting in injuries to KENTNER. (PA 10)

In 1969, KENTNER filed a negligence action against SMALLEY and SMALLEY'S insurance carrier, ROYAL INDEMNITY COMPANY, for KENTNER'S injuries resulting from SMALLEY'S negligence. (P 3) On October 30, 1970, in compromise and settlement of KENTNER'S suit against SMALLEY and its insurer, KENTNER executed a "RELEASE OF ALL CLAIMS" which recited payment to KENTNER of $24,000. (PA 11) The "RELEASE OF ALL CLAIMS" provided that in consideration of the $24,000 paid to KENTNER, KENTNER released and forever discharged ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and *any other person, firm or corportion* charged or chargeable with responsibility or liability, their heirs, representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action arising from the accident on November 30, 1967, at the SMALLEY warehouse. (PA 11) The Release also provided that the payment and settlement in compromise "is made to terminate further controversy respecting *all* claims for damages . . ." (PA 11) (Emphasis added)

Nevertheless, KENTNER filed this suit against SEABOARD, his employer, to recover damages for these injuries suffered in this accident which had occurred at the SMALLEY warehouse on November 30, 1967. (PA 10) In his Amended Complaint in this action, KENTNER alleged that SEABOARD was negligent in failing to provide KENTNER with a safe place to work, in instructing KENTNER to work in an unsafe place, in failing and neglecting to provide KENTNER with proper assistance, and in failing to safeguard KENTNER against injuries. (PA 12) KENTNER'S Amended Complaint alleged that it was an action arising under the FELA. (PA 10)

SEABOARD answered the Complaint filed by KENTNER and set up, among other affirmative defenses, defenses based upon the "RELEASE OF ALL CLAIMS" given by KENTNER in connection with the settlement of his suit against SMALLEY. (PA 13-18, 26-28) SEABOARD also filed a Third Party Complaint against SMALLEY alleging, among other matters, that if SEABOARD was guilty of any negligence, such negligence was secondary or passive and the negligence of SMALLEY was primary or active. (PA 25) Accordingly, SEABOARD sought indemnity against SMALLEY for any sums that might be adjudged against SEABOARD in favor of KENTNER. (PA 25)

SEABOARD then moved for Summary Judgment based upon the pleadings and an admission by KENTNER that the "RELEASE OF ALL CLAIMS" was genuine. (P 5) The trial court granted SEABOARD'S Motion for Summary Judgment on the ground that KENTNER had released SMALLEY and "all other persons, firms and corporations" and that said Release barred KENTNER'S action against SEABOARD. (PA 4)

Thereafter, KENTNER moved for a rehearing and, in connection with said motion, offered an Affidavit of KENTNER'S counsel that, contrary to the language of the "RELEASE OF ALL CLAIMS" releasing SMALLEY and "any other person, firm or corporation", it was not the intention of KENTNER or his counsel to release SEABOARD. (PA 28-29) SEABOARD moved to strike the Affidavit and a Stipulation to the same effect on the grounds that said Affidavit and Stipulation purported to vary and contradict the language of the Release and thus were inadmissible. (PA 31) The trial court, after hearing KENTNER'S Motion for Rehearing and SEABOARD'S Motion to Strike the Affidavit and Stipulation, entered its Order Granting SEABOARD'S Motion to Strike and Denying KENTNER'S Motion for Rehearing. (PA 5-6)

KENTNER then appealed to the District Court of Appeal of Florida, Second District, and that court affirmed, per curiam, the judgment entered by the trial court. (P 7) KENTNER then filed a Petition for Writ of Certiorari in the Supreme Court of Florida and said Petition was denied. (P 8)

ARGUMENT

1. THE BROAD GENERAL RELEASE EXECUTED BY KENTNER RELEASING AND DISCHARGING CERTAIN NAMED PERSONS AND "ANY OTHER PERSON, FIRM OR CORPORATION CHARGED OR CHARGEABLE WITH RESPONSIBILITY OR LIABILITY," FROM ALL CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, LOSS OF SERVICES, ACTIONS AND CAUSES OF ACTION, ARISING BY REASON OF A SPECIFIC ACCIDENT EFFECTIVELY RELEASED KENTNER'S CLAIM UNDER FELA AGAINST SEABOARD FOR DAMAGES SUSTAINED IN THE SAME ACCIDENT DESCRIBED IN THE RELEASE.

KENTNER seeks to invoke the jurisdiction of this Court by asserting that the state court decision here sought to be reviewed is "in direct conflict with this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)." (P 8, 15) In an apparent effort to remold the instant case so that such a conflict might appear to exist, KENTNER states (P 11):

> "In the present case, the trial court and the district court of appeal applied the common law rule that a release of one joint tort feasor was a release of all."

In fact, however, analysis of the "RELEASE OF ALL CLAIMS" executed by KENTNER, the defenses asserted by SEABOARD in the trial court, and the Summary Final Judgment for Defendants entered by the trial court proves conclusively that the state court decision in the instant case does *not* involve application of the common law rule but is based upon the fact that KENT-

NER executed a *general* release rather than a special release. KENTNER'S "RELEASE OF ALL CLAIMS" released not only the parties specifically named therein but also "any other person, firm or corporation." (PA 11) On the contrary, the release in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* released and discharged only the following parties: "Radio Corporation of America or General Electric Company or Western Electric Company and its subsidiaries and their respective successors and assigns." (401 U.S. at 342, n. 10)

The extended discussion by this Court in *Hazeltine* as to the common law rule and certain modifications thereof was necessary only because the release in that case itself gave no indication whether Zenith intended to release only the named parties or the named parties plus all others. KENTNER'S "RELEASE OF ALL CLAIMS" clearly and unambiguously releases the named parties *and all others.* Accordingly, not only is there no *direct* conflict between the instant state court decision and this Court's decision in *Hazeltine* but there is *no* conflict of any kind whatsoever. In *Layne & Bowler Corporation v. Western Well Works,* 261 U.S. 387 (1923) this Court, in recognition of its "already burdened docket," held that its Writ of Certiorari should be dismissed and recognized that, where conflict is urged as the basis for granting a Writ of Certiorari, the conflict must be "a *real and embarrassing conflict* of opinion and authority." (261 U.S. at 393) While this Court there was discussing an alleged conflict between circuit courts of appeals, the requirement for a "real and embarrassing conflict" should be equally applicable in considering an alleged conflict between state court decisions on federal questions and a decision of this Court.

KENTNER relies upon 28 U.S.C. §1257(3) to establish jurisdiction in this Court. Presumably KENTNER would contend that the instant case is one in which rights are "specially set up or claimed under the . . . statutes of . . . the United States." KENTNER, in his Petition, also discusses the construction of the FELA and its "humanitarian and remedial purposes." (P 8-9) Of course, the instant case does not involve construction of the FELA or its application but is concerned solely with federal case law as to the effect of KENTNER'S "RELEASE OF ALL CLAIMS".

The *only* federal appellate decision involving a general release under FELA is that of *Panichella v. Pennsylvania Railroad Company,* 268 F.2d 72 (3d Cir. 1959), cert. denied 361 U.S. 932, 80 S.Ct. 370, 4 L.Ed.2d 353 (1960). In that case, a railroad company directed its employee to go to a resturant, eat breakfast and bring back lunch for himself and another employee. While en route to the restaurant, the employee slipped and fell on an icy sidewalk abutting the property of Warner Brothers Pictures, Incorporated. The injured employee, by his attorney, made a claim against Warner and negotiated a settlement thereof with the Traveler's Insurance Company, the liability insurance carrier for Warner. In connection with the settlement, for a valuable consideration, the injured employee executed and delivered a written release which released "Warner Brothers Pictures, Incorporated . . . *and all other persons, firms and corporations* of and from any and all claims, demands, rights and causes of action of whatsoever kind and nature," arising from the accident. (268 F.2d at 74) (emphasis supplied)

The railroad paid none of the consideration for the release, was not a party to it and in fact was not aware of the settlement until several days after the release

had been delivered. After consummating the settlement, the plaintiff instituted a suit against the railroad company. The trial court entered judgment for the employee. The Third Circuit reversed and held that the release barred the employee's claim under FELA against the railroad. The form of release in *Panichella, supra,* is almost identical in pertinent language to the release in the instant case. Just as the release executed by Panichella was a general release, the release executed by KENTNER was a general release. On the contrary, the federal decisions relied upon by KENTNER in his Petition, that is, *Hazeltine* and *Cates v. United States,* 451 F.2d 411 (5th Cir. 1971), involved special releases, which were expressly limited in their operation to certain described parties.[1]

Aside from the *Panichella* decision which is squarely in point, there are numerous non-FELA decisions holding that a general release, as executed by KENTNER, releases *all* persons. In *Morrison v. General Motors Corporation,* 428 F.2d 952 (5th Cir. 1970), the Fifth Circuit upheld the validity of a general release and recognized that language releasing "all other persons, firms or corporations" satisfies the requirement of the Uniform Joint Tort Feasor's Act, to-wit, that a release does not discharge other tort feasors "unless the release so provides." The Fifth Circuit noted that "all" means "all" without requiring the insertion of the names of any and all other persons. (428 F.2d at 953) *See also* the decisions by Chief Judge Hammond in *Peters v.*

[1] KENTNER also cites a decision by the Supreme Court of Alaska, *Young v. State,* 455 P.2d 889 (Alaska 1969) which involves only questions of Alaska State law and *Wiederhold v. Elgin, Joliet and Eastern Railway Company,* 368 F.Supp. 1054 (N.D. Ind. 1974), a trial court decision which, we submit, is erroneous in that it fails to distinguish between a general release and a special release.

Butler, 251 A.2d 600 (Md. 1969) and *Pemrock, Inc. v. Essco Co., Inc.*, 249 A.2d 711 (Md. 1969) and see *Hasselrode v. Gnagey*, 172 A.2d 764 (Pa. 1961); *Oxford Commercial Corporation v. Landau*, 190 N.E.2d 230 (N.Y. 1963); *Poston v. General Motors Corporation*, 465 S.W. 2d 841 (Tex. App. 1971); *Dorenzo v. General Motors Corporation*, 334 F.Supp. 1155 (E.D. Pa. 1971)

Thus, whether in an FELA context or not, a general release is a general release and operates as such. Of course, in the instant case, if SMALLEY had not obtained a general release which also released SEABOARD, SEABOARD'S Third Party suit against SMALLEY for indemnity could have increased SMALLEY'S liability for KENTNER'S injuries regardless of SMALLEY'S settlement with KENTNER.[2] Since the Release executed by KENTNER was a general release, the Release bars KENTNER'S action against SEABOARD and, consequently, SEABOARD'S claim for indemnity against SMALLEY need not be enforced.

2. THE PAROL EVIDENCE RULE PROTECTS SEABOARD, WHOSE RIGHTS DEPEND ON THE LANGUAGE OF THE RELEASE EXECUTED BY KENTNER, AND PREVENTS KENTNER FROM CONTRADICTING THAT LANGUAGE.

On the basis of a footnote in the *Hazeltine* case, KENTNER argues that the decision of the state court in the instant case applying the parol evidence rule is "in direct conflict" with this Court's holding in *Hazeltine*. This Court in *Hazeltine* held that evidence of the intention of the parties was admissible to determine whether the parties to the release intended to release Hazeltine Research, Inc., which was not a party to the

[2] *Cf.* the discussion by Judge Tuttle in *Morrison v. General Motors Corporation*, 428 F.2d 952, 954 (5th Cir. 1970).

release. As we have demonstrated hereinabove, the release in *Hazeltine* did not purport to release any persons other than those named specifically. Under these circumstances, evidence of the parties' intention as to a person not specifically named was perfectly consistent with the language of the release and was not an attempt to vary that language. Since there was no reference, either specifically or generally, to HRI in the release, HRI acquired no rights under that release. On the contrary, in the instant case, SEABOARD did acquire rights under the Release executed by KENTNER and, further, the evidence of intention offered by KENTNER plainly contradicts the clear and unambiguous language of the Release and is an attempt to vary that language.

Although the parol evidence rule may not have been applicable to HRI under the circumstances of the *Hazeltine* case and the language of that Release, the rule does apply when an instrument is executed as the final embodiment of an agreement and becomes the act of the parties and where the parol evidence is offered to vary the legal effect of its terms. Under such circumstances, the rule operates to protect all whose rights depend upon the instrument even though not parties to it. *Pugh v. Commissioner of Internal Revenue,* 49 F.2d 76, 79 (5th Cir. 1931), *cert. denied sub. nom., Pugh v. Burnet,* 284 U.S. 642, 52 S.Ct. 22, 76 L.Ed. 546 (1931). *See also Jurs v. Commissioner of Internal Revenue,* 147 F.2d 805 (9th Cir. 1945); *Commissioner of Internal Revenue v. Dwight's Estate,* 205 F.2d 298 (2d Cir. 1953), *cert. denied,* 346 U.S. 871, 74 S.Ct. 121, 98 L.Ed. 380 (1953); *Great American Ins. Co. N.Y. v. Gulf Marine Drilling No. 1,* 302 F.2d 332 (5th Cir. 1962); *Clark v. United States,* 341 F.2d 691 (9th Cir. 1965) Persons whose rights depend upon a release are not "strangers" to the instrument. *Cornellier v. Hinsdale Raceway, Inc.,* 248 A.2d 91 (N.H. 1968).

The Release executed by KENTNER is an integrated written release and the clear and unambiguous terms thereof cannot be varied by parol evidence. *See Annotation, Applicability of Parol Evidence Rule in Favor Of or Against One Not a Party to Contract of Release,* 13 ALR3d 313, 318-319 (1967) Accordingly, the decision of the state court excluding the evidence offered by KENTNER to contradict the terms of the release was a correct application of the parol evidence rule and the decision does not conflict with the decision of this Court in *Hazeltine.*

CONCLUSION

Petitioner seeks a third review of the state trial court's decision in this case by claiming conflict with a decision which is clearly consistent with, rather than contrary to, the trial court decision. The issue in the instant case, the effect of a general release, arises only coincidentally in the FELA context and, in the absence of any conflict, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District, have been sent by mail this 6th day of April, 1974 to Marvin E. Barkin, Esquire and Fred W. Pope, Jr., Esquire of Trenam, Simmons, Kemker, Scharf & Barkin, Post Office Box 1102, Tampa, Florida 33601, Attorneys for Petitioner, Aldon Keith Kentner.

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